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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1968

No.

A. R. INDUSTRIES, INC., a corporation,
Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SACRAMENTO,
Respondent,

and

FRANK CERVANTES,
Real Party in Interest.

ANSWER TO PETITION FOR WRIT OF CERTIORARI

The Real Party in Interest prays that a writ of certiorari be denied.

CITATIONS TO OPINIONS BELOW

The opinion of the trial court on petitioner's motion to quash service of summons is incorporated in the

petition for Writ of Certiorari, and the real party in interest incorporates that herein by reference. The opinion of the Court of Appeal, Third Appellate District, State of California is reported in 268 A.C.A. 344, and a copy of said opinion is printed and set forth in petitioner's request for Writ of Certiorari and the real party in interest adopts that hereto.

QUESTIONS PRESENTED

Whether on the facts of this case, maintenance of the present suit in California deprives petitioner of its rights under the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

STATEMENT

That on or about the 3rd day of June, 1966, the Formica Corporation, a subsidiary of American Cyanamid Company of Wayne, New Jersey, contracted with the petitioner, A. R.. Industries, Inc., for the manufacture of three buffing machines, total weight: 22,800 lbs. This contract took place between the two corporations, one being in New Jersey and the other being in Ohio. The contract specifically provided that the machines were to be manufactured for the Formica Corporation plant in Roseville, California. The machines were sent to Roseville, California f.o.b.

It is undisputed that the petitioner is not, and never has been, licensed or authorized by the Secre-

tary of State to do business in the State of California. The petitioner does not, and never has, maintained offices in the State of California. That the petitioner is not, and never has been, qualified with any governmental agency in the State of California. That the petitioner does not own any real or personal property in the State of California. That the petitioner has advertised in national media.

REASONS FOR DENYING WRIT OF CERTIORARI

The petition for Writ of Certiorari should not be granted in this case because the opinion of the Court of Appeal is in conformity with prior decisions of the United States Supreme Court and the State of California, and does not result in deprivation of petitioner's right under the Due Process laws of the United States Constitution.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

The petitioner's argument regarding the reasoning behind the Court of Appeal's decision is wholly without merit. An analysis of the Court's decision indicates that the Court of Appeal reached its decision based on the complete factual picture and not merely one isolated fact. The facts on which the appellate court reached its decision are as follows:

1. Bids were sent out by Formica Corporation to build a buffing machine to certain specifications to be built for the Formica Plant in Roseville, California.

2. The machine was built to be sent to California.

3. The petitioner knew the machine would be sent f.o.b. and this was included in the sales price.

4. The petitioner knew the machine would be used by California residents.

5. The petitioner knew that if any accident occurred it would occur in California to a California resident.

6. This is the type of product that was of such a large size and natur that the market was understandably restricted.

7. This is not a product which ultimately came into California, but it was designed, manufactured and sold knowing specifically that it was to be shipped and used in the State of California.

8. The contract was not completed until delivered in California as indicated by the requirements f.o.b. Roseville, California.

9. There had been a delivery of one lintel machine to California prior to the date this buffing machine was sent to California.

10. The petitioner advertised in national media. For the first time, the petitioner now claims that he did not advertise in any midwestern states. It should be brought to the Court's attention that this did not appear in the affidavit filed on behalf of petitioner.

11. The Real Party in Interest has the burden of proving the defect.

12. The medical witnesses are located in California.

13. The witnesses to the accident are located in California.

The Court of Appeal in its opinion, states that in order to have jurisdiction over an out-of-state defendant there must be certain "minimum contacts" with the state so that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *International Shoe Company v. Washington,* 326 U.S. 310, 316 (90 L.Ed. 95, 102, 66 S.Ct. 154, 161).

> "International Shoe was cited and its concept was repeated thusly by our Supreme Court in *Fisher Governor Co. v. Superior Court* (1959) 53 Cal.2d 222, at page 224: 'Code of Civil Procedure, section 411, subdivision 2, authorizes service of process on foreign corporations that are "doing business in this State." That term is a descriptive one that the courts have equated with such minimum contacts with the state "that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"'"

The petitioner relies heavily on the case of *Hansen v. Denckla,* 357 U.S. 235. In this regard the case of *Phelps v. Anchor Hocking Glass Corporation,* 413 P. 2d 732, analyzes the *Hansen v. Denckla* case as follows:

> "It has been nearly a decade since the United States Supreme Court handed down *Hansen v. Denckla,* supra. That case was an unusual situation in which the Court achieved substantial

justice, *but it is of questionable value as a precedent regarding the problem of personal jurisdiction over non-resident defendants.* In that opinion, the majority affirmed the *McGee* principle that a defendant renders himself amenable to jurisdiction by committing a single act within the forum state. The majority went on to say: '. . . It is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws.' Cited at 357 U.S. at page 253, *Hansen v. Denckla.*

". . . This statement has caused State Courts some concern which is discussed below. *We do not think the quoted language can be construed literally.* To do so is to revitalize the implied consent theory emasculated by the *International Shoe* case and to reverse the trend expanding state jurisdiction over non-residents which trend was recognized in the *Hansen* decision. To make the requirement of purposeful activity within the state a necessary prerequisite to personal jurisdiction in all cases undermines the notion that the facts of each case must be examined to decide whether it is fair to exercise jurisdiction over the defendant. Furthermore, it is apparent that all personal jurisdiction questions cannot be determined by asking whether the defendant purposefully conducted activities within the forum state to obtain the benefits and protections of its laws. *Tortious and negligent acts are obvious examples in which it is unrealistic to say that the actors first considered the laws of the state in which such acts were committed. A rule limiting juris-*

diction to defendants who purposefully conduct activities within the state cannot properly be applied in product liability cases in view of the fortuitous route by which products enter any particular state. Cummins, In Personam Jurisdiction Over Nonresident Manufacturers in Product Liability Actions, 63 Mich. LR 1028. (Emphasis added.)

"A fair reading of the *Hansen* decision leads us to the conclusion that the Supreme Court is concerned with our federalism. State boundaries may be as easily erased by the enhancement of state power as by the expansion of national authority. . . . But the *Hansen* case does not affect the test of personal jurisdiction over non-resident defendants established in *International Shoe.* We are still required to determine whether it is fair to exercise jurisdiction over the defendant.

"The next question is how far the states have extended jurisdiction over non-resident defendants in product liability cases. Many decisions were compiled by Professor Cleary in The Length of The Long Arm, 9 Journal of Public Law 293, where he first notes that distinctions in principle no longer exist between individuals and corporations for purposes of jurisdiction. He then concludes state courts hold that the commission of a tort within the territory of the forum, or sustaining injury within the territory of the forum from a tort committed elsewhere is a sufficient contact upon which to base jurisdiction over the defendant as regards that tort. See also Developments in the Law—State-Court Jurisdiction, 73 Harv. LR 909. Professor Cleary includes product liability cases in the tort category.

> "In the most recent product liability cases state courts have held it is fair to exercise personal jurisdiction over non-resident defendants though his only contact with the forum was that the defective product caused the plaintiff's injury there. But the courts have been concerned about the language in *Hansen* quoted above and have felt constrained to require that the presence of the defendant's product in the jurisdiction must have been a foreseeable event. Apparently, foreseeability is supposed to satisfy the *purposeful activity* language of *Hansen*." (Emphasis added.)

The petitioner was, in fact, doing business within the State of California, had such minimum contacts with the State of California as to satisfy the due process requirements. It is true that A. R. Industries, Inc., maintained no office, owned no property or sent any traveling salesmen into California, but they did advertise in a national media and the product which we are concerned with was sold for the specific purpose of being shipped to California to be used at the Formica Plant, Roseville, California. The product was shipped f.o.b., meaning that the contract was not finished until the sale was completed on delivery thereof. Considering all of the other facts that the bids were sent out from Formica to build it for its California plant, the machine was built to be sent to California, the petitioner knew the machine would be sent f.o.b. and this was included in the sales price, the petitioner knew the machine would be used by California residents, the petitioner knew that if an accident occurred it would occur in California, that

this was a product of such a large size and nature that the market was restricted, that this is not a product which ultimately came to California, but it was designed, manufactured and sold knowing it was to be shipped and used in California, that the petitioner advertised in a national media, that the Real Party in Interest has the burden of proving the defect, and that all lay and medical witnesses and expert witnesses were in California, the Real Party in Interest respectfully submits that the A. R. Industries, Inc., has in fact, met the minimum requirements as set forth in the *International Shoe* case, supra. Further A. R. Industries, Inc., in fact, has purposefully availed itself of the privilege of conducting activities in a foreign state by the use of the national media as well as the shipping of the product f.o.b. California, and as stated in the *Hansen* case, supra, the foreseeability of defendant's products in the jurisdiction is supposed to satisfy the purposeful activity language in *Hansen,* which states that it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the foreign state, thus invoking the benefits and protection of its laws. This foreseeability thereby creates the purposeful activity language and therefore, the requirements of *Hansen v. Denckla,* that it is essential that there be some act by which a defendant purposefully avails itself of the privilege of conducting activities in a foreign state thus invoking the benefits and protection of its laws has in fact been satisfied.

CONCLUSION

Therefore, in analyzing the case on a whole it can be seen that the Court of Appeal analyzed the complete factual situation now before this Court and found that the minimum contact requirement had been met and therefore there was jurisdiction by the Courts of California and for this reason the petition for hearing should be denied.

Therefore, it is respectfully requested that the Petition for Certiorari be denied and that the Real Party in Interest be awarded his costs on appeal.

Dated, Sacramento, California,
June 6, 1969.

Respectfully submitted,
JOHN QUINCY BROWN, JR.,
Attorney for
Real Party in Interest.